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91-1794

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

ANN WALKER,

Petitioner,

v.

ANDERSON ELECTRICAL CONNECTORS,
a Subsidiary of Square D Company

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

This case presents issues which are identical to those for which certiorari was granted in *Estate of Farrar v. Cain and Hobby*, 941 F.2d 1311 (5th Cir. 1991), *cert. granted*, 112 S.Ct. 1159 (1992). This Court's decision in *Farrar* will be dispositive of the present case.

The Eleventh Circuit is one of two circuits which erroneously focuses on the *formality* of the relief obtained rather than the *effect* which the lawsuit has upon the legal relationship of the parties in deciding whether the plaintiff is a "prevailing party" entitled to an award of attorney's fees. Like the Fifth Circuit in *Farrar*, this approach of the Eleventh Circuit conflicts with that of the Ninth and Second Circuits which control fee entitlement by the effect of the lawsuit rather than the formality of the relief obtained. Compare *Romberg v. Nichols*, 953 F.2d 1152, 1159 (9th Cir. 1992) and *Ruggiero v. Krzeminski*, 928 F.2d 558 (2nd Cir. 1991) to *Farrar, supra*, and the present case at App. 1.

Accordingly, like *Farrar*, this case presents the question of whether fee entitlement should be controlled by the material alteration of the parties' legal relationship or by the mere existence of formal relief, such as nominal damages.

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

Ann Walker

Anderson Electrical Connectors, a subsidiary of Square D Company

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OPINIONS BELOW

The Opinion of the Court of Appeals is reported as *Walker v. Anderson Electric*, 112 F.2d 1159 (1991), and is reproduced in the Appendix at page A-1. The Court of Appeals denied the petitioner's Petition for Rehearing on January 6th, 1992. The denial of the Petition for Rehearing is reproduced in the Appendix at page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1991. The petitioner filed a timely Petition for Rehearing. On January 9, 1992, the Court of Appeals denied the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

STATUTES INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), is relevant to this case and provides as follows:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

A jury verdict was entered in the district court finding the defendant guilty of sexual harassment in violation of Title VII of the Civil Rights Act of 1964.[1] The trial court found that the jury verdict obviated the need for injunctive relief because the

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[1] The Eleventh Circuit correctly noted that " [t]he jury found that Anderson Electrical had committed acts of sexual harassment against Walker in violation of Title VII and had invaded Walker's privacy", but "the jury also

verdict alone "provided adequate warning to Anderson Electrical and sufficient guarantee against future sexual harassment". Nevertheless, the plaintiff was held not to be a prevailing party because she did not obtain any *formal* injunction, declaratory relief or nominal damages. These formal remedies were denied because they were mistakenly not preserved in the pretrial order and because the jury verdict was found to have served the same purpose and made them unnecessary. She was denied back-pay on a jury finding that the sexual harassment did not "cause plaintiff to lose any time from work".

Thus, the plaintiff obtained some of what she sought by bringing this suit, but not everything. The denial of back-pay was not appealed, but the other issues were. This Petition only addresses the denial of attorney's fees.

The Eleventh Circuit affirmed the denial of attorney's fees, holding that "to be a prevailing party . . . requires the attainment of something more tangible than a jury finding of sexual harassment". App. 12. The absence of a *formal* injunction and nominal damage award was held fatal to her status as a prevailing party despite the trial court's finding that the jury verdict *informally* served the same purpose by "providing adequate warning to Anderson Electrical and a sufficient guarantee against future sexual harassment". The circuit court reasoned that a jury verdict of sexual harassment which provides such "warning" and "guarantee" does not "materially alter" the relationship between the woman who was sexually harassed and the Company which harassed her. Why such a change in their relationship would not occur in that situation was not fully explained by the Circuit court, although the lack of a formal court imposed remedy was stressed. App. 12.

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found that Walker had sustained no monetary damages . . . as a proximate consequence of these violations". *Walker v. Anderson Electrical*, 944 F.2d 841 (11th Cir. 1991). The jury verdict on special interrogatories is set forth in footnote 4 of that Opinion. App. 1. While the plaintiff could not obtain true compensatory or punitive damages under Title VII as it existed at the time of trial, she sought back-pay which was allowable.

REASONS FOR GRANTING THE WRIT

I

The Petition Presents Issues Identical To Those Pending Before the Court In *Farrar*.

The outcome of the present case will be controlled by this Court's decision in *Estate of Farrar v. Cain and Hobby* 941 F.2d 1311 (5th Cir. 1991), *cert granted*, 112 S.Ct. 1159 (1992), because it presents an issue which is identical to the issue before the Court in *Farrar*, viz: whether fee entitlement should depend on the *formality* of the relief awarded in a civil rights action rather than the *effect* which the lawsuit has had on the relationship between the parties.

Due to the similar nature of the issues pending before this Court in *Farrar* and the present case, petitioner argues that the appropriate course of action would be for this Court to grant the petition for certiorari and summarily rule on the issue and merits presented therein after it has decided *Farrar*. This course of action is in line with the manner in which this Court has previously handled situations in which petitions for certiorari have addressed identical issues. See e.g. *Helvering v. Weise*, 292 U.S. 614 (1934).

II

The Circuits Are Split In The Interpretations Of This Court's Decisions In *Hewitt*, *Rhodes*, and *Texas Teacher's Association*.

Currently, there is a split in the Circuits in determining the test for fee entitlement. In the Eleventh and Fifth Circuits, the formality of relief controls fee entitlement rather than the material alteration of the parties' legal relationship, but in the Second and Ninth Circuits, the opposite is true. Compare *Romberg v. Nichols*, 953 F.2d 1152, 1159 (9th Cir. 1992) and *Ruggiero v. Krzeminski*, 928 F.2d 558 (2nd Cir. 1991) with *Estate of Farrar v. Cain and Hobby*, 941 F.2d 1311 (5th Cir. 1991), *cert*

granted, 112 S.Ct. 1159 (1992), and the present decision below at App. 8-12. The approach of the Second and Ninth Circuits comports with this Court's decisions in *Hewitt v. Helms*, 482 U.S. 755 (1987), *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202 (1988), and *Texas State Teachers v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 109 S.Ct. 1486 (1989). The holding of the Eleventh Circuit below and the Fifth Circuit in *Farrar, supra*, are unacceptable under these cases because denial of a fee was premised on the lack of formal relief rather than on analysis of the materiality of the alteration of the parties' legal relationships, as required by this Court in *Texas State Teachers, Hewitt*, and *Rhodes*.

The court below held that being a prevailing party for purposes of attorneys' fees "requires *something more tangible* than a jury finding of sexual harassment". App. 12. The only thing "more tangible" that the plaintiff could have received was a formal injunction (or some other formal remedy) because the trial court found that the jury verdict informally achieved the same thing as an injunction by "providing adequate warning to Anderson Electrical and a sufficient guarantee against future sexual harassment". The circuit court did not disagree with this finding, but still required the plaintiff to achieve "something more tangible" than that. This requirement is in direct conflict with previous holdings of this Court.

In *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980), this Court held that "[n]othing in the language of § 1988 conditions the District Court's power to award fees . . . on a judicial determination that the plaintiff's rights have been violated". *Id.* The *Maher* Court noted that the Congressional history "expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief". *Id.* 448 U.S. at 129 [quoting S. Rep. #94-1011, p. 5 (1976), U. S. Code Cong. & Admin. News 1976, pp. 5508, 5512]. Similarly, in *Hewitt v. Helms*, 107 S.Ct. 2672, 2676 (1987), this Court has held that "[i]t is settled law, of course,

that relief need not be judicially decreed in order to justify a fee award".

It is well established that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute". *Texas Teachers Assn. v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 791-793 (1989). The trial court below found that the jury verdict was the equivalent of formal injunctive relief because it "provided adequate warning to Anderson Electrical and a sufficient guarantee against future sexual harassment". The Eleventh Circuit did not disagree with this finding of fact or reverse it as clearly erroneous, but nevertheless held that the jury verdict amounted to "nothing more" than "'the moral satisfaction of knowing that a federal court concluded that his rights had been violated' ". App. 12.

That ruling creates error of exceptional public importance because a jury verdict of sexual harassment is not merely "the moral satisfaction" of knowing your rights have been violated. It is much more. As the trial court found, it is "adequate warning to Anderson Electrical and a sufficient *guarantee* against future sexual harassment". It is also a formal rejection of the Company's mistaken belief that sexual harassment is not occurring or that it is not sufficiently "severe or pervasive" to alter the conditions of women's employment or to create an abusive working environment". The jury verdict further told the defendant Company that it "should have known of the sexual harassment" and "failed to take sufficient remedial action" to prevent it.[2]

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[2] The jury was instructed that the Eleventh Circuit requires these things be proven by the plaintiff in order to return a verdict of harassment and the jury verdict is presumed to be in accordance with such instructions. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1097 n. 1 (11th Cir. 1987); *Berndt v. Kaiser v. Aluminum*, 789 F.2d 253, 261 (3rd Cir. 1986). The law of this Circuit requires those same findings to support a jury verdict of sexual harassment. *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905 (11th Cir. 1988).

To hold that these things do not alter the relationship between the woman who is sexually harassed and her employer creates error of exceptional importance for three reasons. First, it would be incredible to assume that a verdict of pervasive sexual harassment does not alter the defendant's conduct. For such a material change not to occur from a jury verdict of sexual harassment would require a callous disregard toward such things.

Second, sexual and racial harassment cases have often involved nothing more than what was achieved by the current jury verdict. Until the recent changes in the law, damages were not available under Title VII. Nor is back-pay usually involved when the plaintiff does not lose time from work (as in this case).[3] Injunctive relief accomplishes nothing more than what the trial court found the jury verdict itself accomplished here. Thus, if the alteration of the parties' relationship was not enough in the present case, it will likely not be enough in any case of sexual or racial harassment and fees will often be unavailable in such actions as a result.

Third, the Circuit Court opinion hinges fee entitlement on the precarious distinction between verdicts which have a one dollar nominal damage and those that do not. The law of the

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[3] Admittedly the plaintiff did not achieve all the relief she sought in the lawsuit, but that is not required. All that is required by this Court and this Circuit is that she "achieve some of the benefit sought in bringing suit". *Texas State Teachers Assn. v. Garland Ind. Sch. Dist.*, 489 U.S. 782 (1989); *Crowder v. Housing Authority of Atlanta*, 908 F.2d 843, 848-50 (11th Cir. 1990). The mere fact that she gained no back-pay because she "suffered no lost time from work" does not affect her status as the prevailing party. This Court has also held that damages are not essential to a Title VII attorney fee award in instances where sexual harassment was at issue. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 2404-05, 91 L.Ed. 49 (1986) ("First, the language of Title VII is not limited to 'economic' or 'tangible' discrimination".). This Court has directly held that a monetary judgment is not necessary in order to be the prevailing party. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415, 95 S.Ct. 2362, 2370, 45 L.Ed.2d 280 (1975); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 965 (1968); *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986).

majority of circuits holds that such a one dollar award will make the plaintiff a prevailing party. *Romberg v. Nichols*, 953 F.2d 1152 (9th Cir. 1992) (allowing attorney's fees where only nominal damages were awarded, and discussing the award of attorney's fees in other circuits where only nominal damages were awarded).

It is an untenable position for the law to allow a one dollar nominal award for sexual harassment to create a right to attorney's fees, but an *identical* verdict without the one dollar attached does not. Attorney's fees should not hinge on such a flimsy distinction. Such a view focuses too much on the formality of the relief, rather than the effect on the parties. It thereby violates the clear holdings of this Court which command that the formality of the relief is unimportant. Where a plaintiff obtains a jury verdict of sexual harassment sufficient to violate Title VII and sufficient to "guarantee against further sexual harassment", she is just as deserving to be paid her attorney's fees as a plaintiff who obtains a one dollar nominal damage award. It is the substance and effect of the verdict, not its outward form, which is crucial to the determination of whether she is prevailing.[4] *Texas Teachers Association v. Garland Ind. Sch. District*, 489 U.S. 782, 791-93 (1989). It is obviously not the one dollar nominal award itself which alters a legal relationship in a manner Congress sought to promote, but the end of the harassment and the end of the defendant's denial of its existence which accomplishes that alteration.

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[4] It is not the one dollar award which makes the plaintiff prevail, but what it represents. It *represents* the material alteration of the legal relationship between the parties that is *caused* by the jury verdict, but the one dollar is not the alteration itself. The alteration occurs with or without the nominal award. It is the jury verdict that causes such alteration of the parties' relationship by ending the defendant's denial that the harassment occurred and ending its claim that it is not responsible because it took adequate steps to prevent it. Only with that verdict can the "guarantee against future harassment" be sufficient to obviate injunctive relief. The nominal damage without the verdict does not obviate injunctive relief or cause such an alteration of the party's legal relationships.

In *Texas State Teachers, supra,* this Court held that the plaintiff was the prevailing party even though he only obtained a court *ruling* on a "minor" claim and there was no monetary or injunctive relief which flowed from that ruling. That decision recites only a district court "finding" of a violation and implicitly notes that there was no relief awarded for this violation. The underlying Court of Appeals' decision was even clearer when it explicitly stated that "no relief was given with respect to this holding". *Texas State Teachers v. Garland Ind. Sch. Dist.*, 777 F.2d 1046, 1050 n. 5 (5th Cir. 1985). Thus, this Court has squarely held that a finding of a violation is sufficient to become a prevailing party without *any* formal relief flowing from that finding so long as it results in a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute". *Id.* 109 S.Ct. at 1493. It is that effect, and not the existence *vel non* of formal court remedies, which is the "touchstone" for fee entitlement. *Id.*

The very cases relied upon by the circuit court hold that it is not the formality of a judgment which makes the plaintiff a prevailing party, but "some action or cessation of action by the defendant that the judgment produces". *Hewitt v. Helms*, 482 U.S. 755, 761-762 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 203 (1988). Even where a formal judgment is achieved, that will not be enough to become a prevailing party if it fails to alter the relationship between the parties because "the real value of the judicial pronouncement . . . is in settling some dispute *which affects the behavior of the defendant toward the plaintiff.*" *Hewitt, supra,* 482 U.S. at 761 (emphasis in original); *Rhodes, supra,* 488 U.S. 1, 109 S.Ct. at 203. The jury verdict below clearly satisfies this test. The award of one dollar in nominal damages would add nothing more to the change in relationship. A distinction between verdicts with a one dollar award and those without it is simply not an adequate basis for deciding who is a prevailing party.

The circuit court recited these principles of law, but in applying them it reached the wrong conclusion when it equated the jury verdict here to mere "moral satisfaction" of the type

involved in *Hewitt v. Helms, supra.* That court mistakenly thought that the plaintiff in *Hewitt* had achieved a "finding of a due process violation" and was arguing this finding to be sufficient to trigger attorney's fees. This Court, however, made it clear that *Hewitt* had *lost* "on all of his claims" on summary judgment, that his case was *never tried* on any issue, that he never received a verdict or judgment on *any issue*, and that he did *not* obtain relief informally "without benefit of a judgment". *Id.* 482 U.S. at 757-760. Instead of a "finding of a due process violation", this Court stated that "[t]he most that [Hewitt] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim". *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). It was in this limited and much different context that this Court spoke of mere "moral satisfaction". *Id.* at 760 and 762. This Court did not make those statements about a jury verdict which was found to be tantamount to an injunction. It was only this misreading of *Hewitt* which allowed the circuit court to equate the jury verdict here to the "interlocutory ruling that [Hewitt's] complaint should not have been dismissed for failure to state a claim".

The same defect occurs in the Eleventh Circuit's reliance on *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202 (1988). The circuit court held that the plaintiff had a lesser status than in *Rhodes* because she "did not attain even a declaratory judgment as did the plaintiff in *Rhodes*". That is exactly the *opposite* of what *Rhodes* holds. That decision holds that it is *unimportant* whether a formal declaratory judgment is entered because a plaintiff prevails where he "affects the behavior of the defendant towards the plaintiff" regardless of whether he does so formally or informally.[5] The appellate court reached the opposite re-

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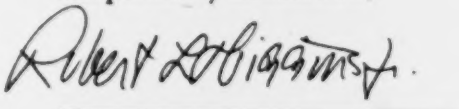
[5]The circuit court ignored the most important part of the holding in *Hewitt* and *Rhodes*. Those two decisions held that "[i]t is settled law . . . that relief need not be judicially decreed in order to justify a fee award under § 1988". *Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 203 (1988). They adopted the catalyst test, rather than rejecting it, when they held that "[a] lawsuit sometimes produces voluntary

sult by making the achievement of a formal remedy a "first step on the road to obtaining relief and affecting the behavior of the defendant towards the plaintiff". App. 11. The decision in *Rhodes* and *Hewitt* do not make formal relief a necessary "first step on the road to obtaining relief", but hold that such formal relief is neither necessary (*Hewitt*) nor important (*Rhodes*). The court of appeals did the opposite by making formal relief not only important, but essential, thereby violating the Supreme Court's holdings in *Rhodes, Hewitt* and *Texas State Teachers*.

Respectfully submitted,



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action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment — e.g. . . . a change in conduct that redresses the plaintiff's grievances". *Id.* The Court held that "[w]hen that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor". *Hewitt v. Helms*, 482 U.S. at 761 [citing *Maher v. Gagne*, 448 U.S. 122, 129 (1980)]. The Court further held that it makes no difference whether the relief comes formally or informally because "[a]t the end of the rainbow lies not a judgment, but some action or cessation of action by the defendant that the judgment produces — the payment of damages, or some specific performance, or the termination of some conduct". *Id.*

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing has been served by United States mail, postage prepaid and properly addressed on Mr. William F. Gardner, Attorney at Law, 1700 AmSouth/Sonat Tower, Birmingham, Alabama 35203.

This the 8th day of May, 1991.

Robert L. Wiggins, Jr.

ROBERT L. WIGGINS, JR.

APPENDIX

A-1

Ann WALKER, Plaintiff-Appellant,

v.

ANDERSON ELECTRICAL CONNECTORS, a Subsidiary of Square D Company, Defendant-Appellee.

No. 90-7636.

United States Court of Appeals,

Eleventh Circuit.

Oct. 18, 1991.

Appeal from the United States District Court for the Northern District of Alabama.

Before FAY and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

FAY, Circuit Judge:

Plaintiff-Appellant, Ann Walker ("Walker") appeals the outcome of several post-trial motions in which the district court ruled that Walker was not entitled to declaratory or injunctive relief, nominal damages, or attorneys fees, despite a jury finding of sexual harassment and invasion of privacy. For the reasons that follow, we AFFIRM.

I. BACKGROUND

In August 1989, Ann Walker sued both her employer, Anderson Electrical Connectors ("Anderson Electrical"), and her union, Local Lodge 2601, International Association of Machinists & Aerospace Workers, AFL-CIO, under Title VII of the Civil Rights Act of 1964,[1] claiming that they "condoned and

[1] 42 U.S.C. § 2000e *et seq.*

allowed [her] to be sexually harassed by management and personnel for a continuous period, making her working conditions intolerable." Walker also brought pendent state tort claims against Anderson Electrical for invasion of privacy and outrage.[2]

Initially, Walker's complaint contained a demand for jury trial only on the pendent tort claims. Following publication of an opinion in which the same district court judge permitted the use of a jury trial to resolve Title VII claims,[3] however, Walker successfully added her Title VII issues to the list of other issues to be heard by the jury. *Walker v. Anderson Elec. Connectors*, 736 F.Supp. 253 (N.D.Ala. 1990).

In her complaint, Walker sought relief in the form of back-pay, benefits, lost seniority, loss pension, declaratory and injunctive relief, and attorneys' fees and costs for the alleged Title VII violation. Walker also sought actual and punitive damages for the pendent tort claims. At the pre-trial conference, however, Walker narrowed her grocery list of remedies by dropping her request for a declaratory judgment and an injunction. Walker's position statement, as drafted by Walker and incorporated into the pre-trial order by the court, reads as follows:

> As a result of these discriminatory actions of the defendants, the plaintiff seeks back-pay (including interest), benefits, lost seniority and loss pension. The plaintiff seeks compensatory and punitive damages according to proof against the defendants for invasion of privacy and tort of outrage. The attorney also seeks a reasonable attorney's fee, costs, and expenses of this litigation.

Following four days of trial, the jury returned its verdict through the use of special interrogatories. The jury found that

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[2] The claim of outrage never reached the jury. It was dismissed on a motion for summary judgment.

[3] *Beesley v. The Hartford Fire Insurance Co.*, 717 F.Supp. 781 (N.D.Ala. 1989).

Anderson Electrical had committed acts of sexual harassment against Walker in violation of Title VII and had invaded Walker's privacy. However, the jury also found that Walker had sustained no monetary damage, either in the form compensatory or punitive damages as a proximate result of these violations.[4] In response to the interrogatories involving Local Lodge 2601, the jury determined that the Union had committed no acts of sexual harassment against Walker.

Based on the answers to the special interrogatories, the district court entered final judgment ordering that the "[p]laintiff, Ann Walker, shall have and recover nothing of defendants, or either of them." The court also refused to grant Walker attorneys' fees.

Walker filed several post-trial motions affecting only Anderson Electrical, all of which were denied. In addition to a motion for a new trial on the subject of damages, which is not at issue, all of the motions sought an injunction, a declaratory judgment, nominal damages, and attorneys' fees based on the

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[4]The interrogatories involving Anderson Electrical and the jury's responses to them are reprinted below.

1. Did defendant Anderson Electrical Connectors (Square D), commit any acts of sexual harassment against plaintiff, Ann Walker, in violation of Title VII of the Civil Rights Act of 1964 . . . ?

YES X NO __

2. ONLY if the jury has answered "YES" to Question No. 1, did the said sexual harassment proximately cause plaintiff to lose any time from work?

YES __ NO X

3. ONLY if the jury has answered "YES" to Question No. 1 and "YES" to Question No. 2, state the amount of wages, if any, which plaintiff has proven by a preponderance of the evidence that she lost as a proximate result of defendant Anderson Electrical Connectors' said conduct violating the Civil Rights Act.

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7. Did defendant, Anderson Electrical Connectors (Square D), invade the privacy of the plaintiff, Ann Walker?

YES X NO __

jury finding of sexual harassment and invasion of privacy. 742 F.Supp. 591. The denial of these motions is the subject of this appeal.

II. DISCUSSION

A.

At the outset, Walker argues that the district court abused its discretion by denying her declaratory and injunctive relief in light of the jury's finding of a Title VII violation. We disagree.

Walker's post-trial motion for injunctive and declaratory relief was interpreted by the district court as a post-trial motion to amend the pre-trial order. The pre-trial order stated that Walker would seek only a money award. The district court indicated that Walker's failure to pursue declaratory and injunctive relief in the pre-trial order, where Walker had initially demanded such relief in her complaint, may have been part of a strategy to achieve a jury trial on the Title VII issues. "The

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8. ONLY if the jury has answered "YES" to Question No. 7, did the said invasion of plaintiff's privacy proximately cause plaintiff any injury?

YES __ NO X

9. ONLY if the jury has answered "YES" to Question No. 7 and "YES" to Question No. 8, state the amount of compensatory damages, if any, which plaintiff has proven by a preponderance of the evidence that she sustained as a proximate result of said defendant's invasion of plaintiff's privacy . . .

$____$

10. ONLY if the jury has answered "YES" to Question No. 8 and ONLY if the jury finds that plaintiff, Ann Walker, has proven by clear and convincing evidence that defendant Anderson Electrical Connectors consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff, state the amount of punitive damages to be assessed against defendant, Anderson Electrical Connectors, for the purpose of punishing it and deterring similar future acts of invasion of privacy.

$____$

absence of any prayer for equitable relief," the noted in its Memorandum Opinion of July 9, 1990, "subtracted somewhat from defendant's arguments against trial by jury."[5]

The court denied Walker's motion to amend the pre-trial order citing Fed.R.Civ.P. 16(e), which states that the pre-trial order "shall control the subsequent course of action unless modified by a subsequent order. The order following a final pre-trial conference shall be modified only to prevent manifest injustice."

The district court's decision to follow the pre-trial order can be reversed on appeal only where the district court has abused its discretion. *Randolph County v. Alabama Power Co.*, 784 F.2d 1067, 1072 (11th Cir. 1986), *cert. denied*, 479 U.S. 1032, 107 S.Ct. 878, 93 L.Ed.2d 833 (1987); *Hodges v. United States*, 587 F.2d 1014 (5th Cir. 1979)[6] "[W]e realize that for pretrial procedures to continue as viable mechanisms of court efficiency, appellate courts must exercise minimal interference with trial court discretion in matters such as the modification of its orders." *Hodges*, 597 F.2d at 1018.

While Rule 16(e) requires that the pre-trial order be modified to "prevent manifest injustice," in this case the modification requested by Walker would only serve to work an injustice against the defendant, Anderson Electrical. As the district court pointed out in its Memorandum Opinion of July 9, 1990, "Walker chose her strategy, forcing Anderson Electrical to choose its strategy. It would be disingenuous of any court to

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[5]According to Walker, the fact that declaratory and injunctive relief were not included in the pre-trial order was simple error. "There is nothing in the Record, and no finding by the district court, that the plaintiff knowingly and voluntarily waived [her] request for injunctive and declaratory relief. The failure to mention such relief in the pretrial Order was merely an oversight." Brief for Appellant at 11.

[6]Decisions of the former Fifth Circuit handed down before October 1, 1981 are binding precedent in this circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

find at this late date that this pre-trial order can be modified post-trial in order to 'prevent manifest injustice.' "

We agree with this reasoning and find that the district court did not abuse its discretion in following the pre-trial order. Walker pursued a damages trial and got just that. It would be unfair to Anderson Electrical to give Walker relief which she did not request; relief for which Anderson Electrical was never permitted to establish a defense.

Walker's central argument on this matter is that the district court has not complied with Fed.R.Civ.P. 54(c). Rule 54(c) states, in pertinent part, that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Applying Rule 54(c) to the facts of her case, Walker contends that she is "entitled" to equitable relief based on the jury's finding of sexual harassment even though she abandoned this claim for relief in the pre-trial conference and actively pursued a monetary award. Walker further contends that Rule 54(c) and Rule 16(e) conflict under these facts and that Rule 54(c) prevails in the event of such a conflict.

We see no conflict and find that Rule 54(c) does not apply to this case. Rule 54(c) requires that the district court grant Walker only the relief to which she is "entitled," even when that relief is not requested in the pleadings. But Walker *did* request a declaratory judgment and an injunction in her pleadings and then abandoned this form of relief at the pre-trial conference in favor of something else, namely a monetary award. Rule 54(c) simply does not sanction this type of maneuvering. We hold that Walker is not entitled to the relief abandoned in the pre-trial order and affirm the district court's denial of her motion for injunctive and declaratory relief.

B.

Walker next argues that a jury finding of sexual harassment in violation of Title VII mandates a court award of one dollar

in nominal damages and that the district court erred by not making such an award. We disagree.

The district court did not instruct the jury on the possibility of awarding nominal damages in the event of a finding of sexual harassment. Walker did not request a charge on nominal damages, nor did she object to the court's failure to make such a charge.[7]

Fed.R.Civ.P. 51, which states that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection," precludes Walker, at this late date, from objecting to the fact that no jury instruction on nominal damages was given at trial. The federal court's long standing policy against additur, as an intrusion on the jury's domain and violation of the Seventh Amendment, also stands in the way of Walker's request for one dollar in nominal damages where the jury awarded none. *See Hattaway v. McMillian*, 903 F.2d 1440, 1451 (11th Cir. 1990); *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935).

Walker argue that *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), requires the automatic award of nominal damages upon the finding of a Title VII violation regardless of Rule 51 and the federal courts' dislike of additur. *Carey* does not, however, address the issue of nominal damages in a Title VII action.

Carey involved interpretation of 42 U.S.C. § 1983,[8] which provides remedy for violations of constitutional rights by per-

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[7]According to Anderson Electrical, the reason that Walker did not take a nominal damages instruction to the jury was because, "[i]f there had been an instruction or jury interrogatory on nominal damages, the jury might have given it, and that was a risk to be avoided by the plaintiff since she was after substantial money." (Brief for Appellee at 39-40).

[8]Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes

sons acting under color of state law. Emphasizing the absolute nature of constitutional rights and "the importance to organized society that those rights be scrupulously observed," *Carey*, 435 U.S. at 266, 98 S.Ct. at 1053, the Court mandated the award of nominal damages upon the finding of a procedural due process violation even where no actual injury had been shown. By contrast, this case involves, not a violation of constitutional rights, but merely, a violation of purely statutory rights under Title VII. Nothing in *Carey* mandates the award of nominal damages for statutory violations.[9]

Because we find that the reasoning in *Carey* applies only to violations of constitutional magnitude, we decline Walker's invitation to extend the rationale of *Carey* to Title VII cases and affirm the district court's denial of Walker's post-trial motion for nominal damages.

C.

Finally, we come to the crux of Walker's appeal — attorneys' fees. While an award of nominal damages, an injunction

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to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[9] Only, *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), *vacated*, ___ U.S. ___, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991), has extended *Carey* beyond the realm of 42 U.S.C. § 1983 by holding that nominal damages are mandatory upon the finding of racial discrimination in the making and enforcement of contracts in violation of 42 U.S.C. § 1981. However, the validity of *Hicks* is questionable. *Hicks* was vacated and remanded in light of the Eighth Circuit's en banc opinion in *Taggart v. Jefferson County Child Support Enforcement*, 935 F.2d 947 (8th Cir. 1991). *Taggart* overruled *Hicks* on the issue of whether a claim for racially discriminatory termination under 42 U.S.C. § 1981 remains actionable after the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), thereby making the *Hicks* court's pronouncements on the issue of nominal damages moot.

or a declaratory judgment would make the prospect of obtaining attorneys's fees much easier, Walker argues that even without these badges of victory she is a "prevailing party" under 42 U.S.C.§ 2000e-5(k)[10] and entitled to attorneys' fees.

42 U.S.C. § 2000e-5(k) provides, in relevant part, "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow *the prevailing party,* other than the Commission or the United States, a reasonable attorneys' fee as part of the costs." (Emphasis added). In *Texas Teachers Association v. Garland Independent School District,* 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), the Supreme Court, in a unanimous opinion, found improper the Fifth and Eleventh Circuits' use of the "central issue" test to determine prevailing party status.[11] In its place, the Court established the standard for identifying prevailing parties:

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Id. at 791-93, 109 S.Ct. at 1493-94 (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278-89 (1st Cir. 1978)).

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[10] Though the parties have cited 42 U.S.C. § 1988 as the controlling fee shifting provision in this case, 42 U.S.C. § 2000e-5(k) is the appropriate fee shifting provision in Title VII actions. This distinction is a technical one, however, as Congress intended the standards for awarding fees under these two statutes to be the same. *See* S.Rep. No. 1011, 94th Cong., 2d Sess. 3-4, *reprinted in* 1976 *U.S. Code Cong. & Admin. News* 5908, 5912. *See also Cofield v. City of Atlanta,* 648 F.2d 986, 987 n. 3 (5th Cir. Unit B 1981) ("The language of section 1988 tracks that of section 2000e-5(k).").

[11] Under the central issue test, the plaintiff must achieve the primary relief sought in order to be deemed a "prevailing party." It is not enough to win on an important side issue. *See Martin v. Heckler,* 773 F.2d 1145, 1149 (11th Cir. 1985) *(en banc).*

Walker claims that the jury verdict materially alters the legal relationship between the parties in the same fashion as an injunction or declaratory judgment. But Walker fails to successfully distinguish *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) and *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988), two Supreme Court cases with similar fact patterns which reject similar arguments. We find these cases controlling.

In *Hewitt*, a plaintiff was denied attorneys' fees, despite a finding by the Third Circuit that his due process rights had been violated. *Hewitt*, 482 U.S. at 757-59, 107 S.Ct. at 2674-75. The plaintiff, a prisoner in the Pennsylvania state prison system, sued prison officials for placing him in disciplinary confinement without due process of law. The district court dismissed the case in a summary judgment motion. On appeal, the Third Circuit reversed, finding that there had, indeed, been a violation of due process. The case was remanded to the district court with instructions to award the plaintiff damages unless the defendants were able to assert an immunity defense. Finding such a defense, the district court again dismissed the case in a motion for summary judgment and in a later ruling denied the plaintiff attorneys' fees. With regard to the denial of attorney's fees, the Third Circuit reversed. Equating its initial finding of a due process violation with a declaratory judgment, the Third Circuit held that the plaintiff was a "prevailing party" under 42 U.S.C. § 1988 and entitled to an award of attorney's fees. The Supreme Court rejected the Third Circuit's rationale and reversed, holding:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces-the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judi-

> cial pronouncement — what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion — is the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Hewitt, 482 U.S. at 761, 107 S.Ct. at 2676.

Walker argues that *Hewitt* is not controlling because, unlike the plaintiff in *Hewitt,* she has achieved much more than a hollow pronouncement on a matter of law. Walker points out that she won a favorable jury determination on the ultimate factual issue in the case and that this determination was an important part of "settling the score" with her employer. The jury finding of sexual harassment, she contends, has forever changed the legal relationship between the parties by foreclosing the defendant's denial of such sexual harassment.

While we find this argument appealing, it simply does not conform to the basic premise of *Hewitt.* With regards to the plaintiff in *Hewitt,* the Court noted that, "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated." *Hewitt,* 482 U.S. at 762, 107 S.Ct. at 2676. Walker received nothing more. The jury's finding of sexual harassment no more altered the legal relationship between the parties than the Third Circuit's finding of a due process violation in *Hewitt.* And, just as the Third Circuit's finding was an important first step on the road to obtaining relief and "affect[ing] the behavior of the defendant towards the plaintiff," *id.* at 761, 107 S.Ct. at 2676, so too is the jury's finding of sexual harassment an important first step for Walker. But, as *Hewitt* suggests, such a finding, without more, will not ordain a litigant the prevailing party.

The Supreme Court's decision in *Rhodes v. Stewart,* 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988), reinforces our holding today. In *Rhodes,* two plaintiffs obtained a declaratory judgment for violations of their First Amendment rights as prisoners in a state corrections facility. Prior to the court's announcement of declaratory relief, however, one of the plain-

tiffs was released from prison and the other died. The Supreme Court held that the declaratory judgment could not, under those circumstances, affect the legal relationship between the parties. The plaintiffs' victory was moot despite the fact that they were awarded a declaratory judgment. As the Court noted, "[a] declaratory judgment ... is no different from any other judgment. It will constitute relief ... if, and only if, it affects the behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 4, 109 S.Ct. at 203.

While the jury's finding of sexual harassment in this case is not moot as it concerns Walker, Walker did not attain even a declaratory judgment as did the plaintiffs in *Rhodes*. Instead, Walker's only claim to the spoils of victory is a jury finding of sexual harassment. "That is not the stuff of which legal victories were made." *Hewitt*, 482 U.S. at 760, 107 S.Ct. at 2675. Therefore, in accordance with *Hewitt* and *Rhodes*, we hold that to be a prevailing party for purposes of 42 U.S.C. § 2000e-5(k), requires the attainment of something more tangible than a jury finding of sexual harassment. The district court did not err in denying Walkers' request for attorney's fees.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Walker's post-trial motions for declaratory and injunctive relief, nominal damages, and attorneys' fees.

(2)

Supreme Court, U.S.
FILED
JUN 10 1992
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NO. 91-1794

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1992 TERM

ANN WALKER,

Petitioner,

v.

ANDERSON ELECTRICAL CONNECTORS,
SQUARE D COMPANY,

Respondent.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a plaintiff, Petitioner here, proceeds to trial on money claims and the jury returns a zero dollar verdict, resulting in Final Judgment that the plaintiff shall recover nothing, is the plaintiff's law firm entitled to an attorneys' fees award on the theory she is the prevailing party?[1/]

[1/] The parties to the case are or have been former employee Phyllis Ann Harris Walker, Square D Company-Anderson Electrical Connectors, and International Association of Machinists & Aerospace Workers, AFL-CIO, and its Local Lodge No. 2601. Since the only issue is attorneys' fees, the only presently interested parties are Square D Company and the Petitioner's law firm (Gordon, Silberman, Wiggins & Childs of Birmingham and Huntsville, Alabama).

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DECISIONS BELOW

The only issue presented by the petition is the claim by the plaintiff's law firm for attorneys' fees.[2/] This was "the crux" of the plaintiff's appeal to the Court of Appeals. The Eleventh Circuit's opinion affirming the denial of attorneys' fees is reported at 944 F.2d 841 (11th Cir. 1991) (erroneously cited by the Petitioner as "112 F.2d 1159").[3/]

The petition is put together by misstating both the Eleventh Circuit's opinion and the Trial Court's opinions on the post-trial motions which were the subject of the appeal. All of the decisions of the courts below are therefore set forth in the Appendix to this brief so this Court can have the accurate record before it.[4/]

[2/] Petition at page 2 ("This Petition only addresses the denial of attorney's fees.").

[3/] Petition at page 1.

[4/] The opinions are set forth as follows in the Appendix:

A: Court of Appeals opinion on October 18, 1991, 944 F.2d 841.

B: Denial of rehearing on January 9, 1992.

C: District Court opinion and judgment on July 9, 1990, 742 F.Supp. 591.

D: District Court opinion on August 6, 1990 and addendum on August 10, 1990, 742 F.Supp. 596.

E: District Court order on August 16, 1990.

STATEMENT OF THE CASE

The holdings of the courts below are barely recognizable in the Petitioner's statement of the case. It is therefore necessary to provide an accurate summary of the case.

A. TRIAL COURT:

The plaintiff sued her Employer and Union alleging she had been sexually harassed by four co-workers.[5/] The complaint was based on Title VII of the Civil Rights Act (42 U.S.C. § 2000e et seq.) with pendent State claims for invasion of privacy and outrage.

During the pendency of the case, the Court ruled in another case that parties have the right to trial by jury on Title VII claims. Following that ruling, the plaintiff, who had already demanded trial by jury on the State law claims, moved for a jury trial on the Title VII claim as well.

The plaintiff's jury trial motion, which was resisted by the defendants, was still pending when the pretrial conference was held. The complaint had sought a declaratory judgment and injunction as well as damages. "At the pre-trial conference, however, Walker narrowed her grocery list of remedies by dropping her request for a declaratory judgment and an injunction." (A-2).

The District Court thereafter granted the motion for trial by jury under Title VII, pointing out that:

[5/] The accused were, like the plaintiff, hourly co-workers and Union members and not managers or supervisors.

> She seeks damages in the form of lost wages and benefits as well as compensation for her physical pain and mental suffering. Lastly, she seeks punitive damages. (736 F.Supp. at 254).

The Petitioner tells this Court that an injunction, declaratory judgment, and nominal damages were denied "because they were mistakenly not preserved in the pretrial order,"[6/] but that is not so.

First, the denial of nominal damages had nothing to do with the Pretrial Order. The Court of Appeals held that FRCP Rule 51 precluded nominal damages because the plaintiff did not request a jury instruction on nominal damages and did not object to the jury instructions not including nominal damages. (A-8).

Second, neither the District Court nor the Court of Appeals accepted the plaintiff's assertion that the dropping of the declaratory judgment and injunction claims was a mistake, and it should not have been repeated in this Court. It was a tactical maneuver to enhance the plaintiff's then pending motion for a jury trial on the Title VII claim.[7/]

Following a four day trial, the case was submitted to the jury on Special Jury Interrogatories. The jury returned its verdict

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[6/] Petition at page 2.

[7/] The Court of Appeals observed that:

> "The district court indicated that Walker's failure to pursue declaratory and injunctive relief in the pre-trial order, where Walker had initially demanded such relief in her complaint, may have been part of a strategy to achieve a jury trial on the Title VII issues." (A-5).

finding that there had been harassment and invasion of privacy but that it did not proximately cause any wage loss or injury. The jury awarded the plaintiff nothing in the way of money. As the Trial Court said in denying the plaintiff's motion for a new trial on damages, "this jury found that there was *no injury whatsoever traceable to any wrong committed by Anderson Electrical.*" (D-5).

With the plaintiff having proceeded through trial on her monetary claims, and with the jury having returned a zero dollar verdict, the Court entered judgment that the plaintiff "shall have and recover nothing of defendants, or either of them." (C-1).

The plaintiff filed a series of post-trial motions for a new trial on damages, a declaratory judgment, an injunction, nominal damages, and a declaration that she was the prevailing party entitled to an attorneys' fee award, all of which were denied. In denying the motion for prevailing party status for attorneys' fees, the Trial Court said that:

> Walker is asking this court to reach conclusions beyond the issues presented and not justified by the evidence. Walker sought no injunctive relief, and there was no credible evidence that any change in procedure or rule by Anderson Electrical was the proximate result of Walker having brought suit. (D-6).

The Petitioner tells this Court that the results she sought after the trial were denied "because the jury verdict was found to have served the same purpose and made them unnecessary" and that "[t]he trial court below found that the jury verdict was the equivalent of formal injunctive relief. . . ."[8/] That seriously misstates the Trial Court's decision, and it has nothing to do with the Court of Appeals' decision.

8/ Petition at pages 2 and 5.

The plaintiff's post-trial motions included a contention for an injunction for females generally, based primarily on a notice regarding the jury verdict which the Union had posted on the Union bulletin board.[9/] The Trial Court rejected the contention after holding that:

> Walker chose her strategy, forcing Anderson Electric to choose its strategy. It would be disingenuous of any court to find at this late date that this pre-trial order can be modified post-trial in order to "prevent manifest injustice." See Rule 16(e). (C-9-10).

The Court then went on to comment that even if it could assume the power to issue an injunction for females generally, it "would decline to do so" for five separate reasons, one of which was "that Title VII itself, bolstered by the jury finding in this case, provides an adequate warning to Anderson Electrical and a sufficient guarantee against future sexual harassment." (C-10).

The Petitioner thus fails to tell this Court (1) that the Trial Court's comment was only one of five dicta reasons for declining to issue an injunction for females in general even if the contention were not barred by Rule 16(e) and (2) that it had reference to the post-trial contention for a "class injunction" in a non-class action with a Pretrial Order which abandoned the injunctive request of the complaint. More serious is the fact that the Petitioner elevates the comment into a holding,[10/] which it obviously was not.

The Petitioner's departure from the record sinks to its deepest depth in saying that the Court of Appeals accepted this

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[9/] Plaintiff's post-trial motion on June 28, 1990, pages 4-5.

[10/] Petition at pages 1-2.

"finding" (the comment having been transformed by the Petitioner into a "finding") and held that formal relief is necessary for attorney's fees.[11/] The fact is that the comment had no role at all in the Court of Appeals' decision. The Court of Appeals' decision was based on Rule 16(e) barring the plaintiff from changing her strategy after the trial and zero dollar verdict. (A-5-7).

B. COURT OF APPEALS:

The plaintiff appealed to the Eleventh Circuit from the denial of the post-trial motions, with the outcome that the Court of Appeals affirmed. 944 F.2d 841 (11th Cir. 1991). On "the crux of Walker's appeal-attorneys' fees," the Court analyzed the issue in the framework of the plaintiffs' contention that regardless of not having a declaratory judgment or injunction or nominal damages, she should have prevailing party status for attorneys' fees. (A-10). The Court applied the "touchstone" standard of *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), treated as "controlling" the decisions in *Hewitt v. Helms*, 482 U.S. 755 (1987) and *Rhodes v. Stewart*, 488 U.S. 1 (1988), and held that "[t]he district court did not err in denying Walker's request for attorneys' fees." (A-11-14).

In contrast, the Petitioner's account of the Eleventh Circuit's decision cannot be reconciled with the Court's opinion.

First, the Petitioner says the Court of Appeals held that the absence of a formal remedy was "fatal" to attorneys' fees.[12/] The Court neither said nor intimated any such idea. On the contrary, the Court analyzed the attorneys' fee contention in the context of the plaintiff's argument that even without formal

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[11/] Petition at page 2.

[12/] Petition at page 2.

remedies, she should be regarded as the prevailing party for attorneys' fees.[13/]

Second, the Petitioner says the Court reasoned that a jury verdict of sexual harassment providing a warning and guarantee against harassment does not materially alter the relationship of the parties.[14/] There is no such reasoning anywhere in the Court's opinion. The Petitioner's assertion is nothing more than an effort to take the dicta comment by the Trial Court regarding an injunction for females generally and transplant it into the Court of Appeals' decision. In fact, it had no role in the Court of Appeals' decision.

C. A MATTER OF STRATEGY:

This case was preeminently a matter of trial strategy geared to money until the jury verdict. The plaintiff moved for and obtained a jury trial on the Title VII claim after dropping the claims for equitable remedies. (A-2-3). The trial evidence included the plaintiff's "great [money] expectations from this case, as testified to by some of the witnesses" (C-11). The Respondent

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13/ The Court started its analysis of the attorneys' fee issue as follows:

> Finally, we come to the crux of Walker's appeal — attorneys' fees. While an award of nominal damages, an injunction or a declaratory judgment would make the prospect of obtaining attorneys's fees much easier, Walker argues that even without these badges of victory she is a 'prevailing party' under 42 U.S.C. § 2000e-5(k) and entitled to attorneys' fees. (A-10).

14/ Petition at page 2.

met and defeated her on that field of battle she had chosen, with the jury returning a zero dollar verdict. The Court of Appeals accurately summarized the case as follows:

> Walker pursued a damages trial and got just that. It would be unfair to Anderson Electrical to give Walker relief which she did not request; relief for which Anderson Electrical was never permitted to establish a defense. (A-7).

REASONS FOR DENYING THE WRIT

From the launching pad of the seriously distorted account of the decision below, the Petitioner argues (1) that this case is identical to another case before the Court on the role of formal relief for attorneys' fees and (2) that the Circuits are split on the role of formal relief for attorneys' fees. Both arguments are inherently baseless because "formal relief" had nothing to do with the Eleventh Circuit's decision. The facts are that the Court of Appeals resolved the issue in the context of the plaintiff's position that formal relief is not necessary to prevailing party status.

Moreover, both of the reasons argued by the Petitioner are wrong and could not warrant a continuation of this quest for attorneys' fees.

I.

THE PETITIONER IS WRONG IN SAYING THIS CASE WILL BE CONTROLLED BY FARRAR

It defies reality for the Petitioner to say this case is "identical" to and "will be controlled" by *Estate of Farrar v. Cain and Hobby*, 941 F.2d 1311 (5th Cir. 1991), cert. granted, 112 S.Ct. 1159 (1992).[15/] The question presented in *Farrar* is:

> Does 42 USC 1988 authorize award of reasonable attorneys' fees to civil rights plaintiffs who recover nominal damages? 60 U.S.L.W. 3563.

That has nothing to do with this case. The law in the Eleventh Circuit has been and is that nominal damages will trigger prevailing party status for attorneys' fees. *Garner v. Wal-Mart Stores*, 807 F.2d 1536 (11th Cir. 1987). The Petitioner

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15/ Petition at page 3.

cannot conceivably argue that any attorneys' fee award in this case might ensue from the outcome in *Farrar*. If this Court holds in *Farrar* that nominal damages create attorneys' fee entitlement, it would have no effect at all on this case.

The reason for the plaintiff's post-trial motion for nominal damages was to obtain attorneys' fees. The plaintiff failed because, for trial strategy reasons, she argued to the jury for real money and said nothing about nominal damages, did not request a jury instruction on nominal damages, and did not take exception to the jury instructions not addressing nominal damages. The door-closer was Rule 51, not any concepts of "formal relief" or the question of whether nominal damages trigger attorneys' fees.[16/]

The fact is that this Court has already resolved the issue which is the subject of this case. As in *Hewitt v. Helms*, 482 U.S. 755 (1987), this case concerned "the peculiar-sounding question whether a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees." The answer in *Hewitt* was No. That was among the Supreme Court precedents applied by the court below as "controlling." (A-12). There is no reason for further debate on the issue.

16/ As the Eleventh Circuit said:

> Fed.R.Civ.P. 51, which states that '[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection,' precludes Walker, at this late date, from objecting to the fact that no jury instruction on nominal damages was given at trial. (A-8).

II.

THERE IS NO CIRCUIT SPLIT AFFECTING THIS CASE

The Petitioner's "Circuit split" argument is both inaccurate and irrelevant for several reasons.

1. Erroneous statement of the Circuit split: The Petitioner begins by erroneously stating the Circuit split. She says it is a division over whether formal relief is necessary for attorneys' fee awards,[17] and that is not so. The Circuit split consists of the issue before the Court in *Farrar* of whether nominal damages result in prevailing party status.[18]

That has no bearing on this case where attorneys' fees could not be based on nominal damages, not because of any proposition of law, but because the plaintiff's post-trial motion for nominal damages was barred by Rule 51. (A-8).

2. Erroneous statement of Eleventh Circuit law: It is beyond reason for the Petitioner to say that the Fifth and Eleventh Circuits are at odds with the Seventh and Ninth Circuits.[19] In *Farrar* itself, the Fifth Circuit pointed out that "[o]ur holding today conflicts with opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits." (941 F.2d at 1316).

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[17] Petition at page 3.

[18] This was the issue in all the cases cited by the Petitioner, consisting of *Farrar*, *Ruggiero v. Krzeminski*, 928 F.2d 558 (2nd Cir. 1991), and *Romberg v. Nichols*, 953 F.2d 1152 (9th Cir. 1992).

[19] Petition at page 3.

The Eleventh Circuit held that nominal damages establishes attorneys' fee entitlement in *Garner v. Wal-Mart Stores*, 807 F.2d 1536 (11th Cir. 1987). The Petitioner relied on this Eleventh Circuit law in the court below. She cannot now profess to be unaware of it.

3. Erroneous statement of the decision below: The Petitioner tells this Court that in the Eleventh Circuit "formality of relief controls fee entitlement rather than the material alteration of the parties' legal relationship,"[20/] and that is entirely contrary to the record. The opinion of the Court of Appeals establishes that:

First, the Court decided the attorneys' fee issue in the framework of the Petitioner's argument that she should be accorded prevailing party status without regard to having no formal remedies. (A-10).

Second, the Court applied the governing standard, established by *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 791-793 (1989), that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." (A-11).

Third, the Court held that this standard of a material alteration of the legal relationship of the parties was not satisfied, the "controlling" precedents being *Hewitt v. Helms*, 482 U.S. 755 (1987) and *Rhodes v. Stewart*, 488 U.S. 1 (1988). (A-11-14).

The Petitioner is thus seeking attorneys' fees in the Supreme Court based on a fictional Circuit split and misstated rendition of both Eleventh Circuit law and the decision below.

20/ Petition at page 3.

III.

THE COURT BELOW CORRECTLY APPLIED SUPREME COURT PRECEDENT

Even more importantly, the Eleventh Circuit's decision was based on "controlling" Supreme Court precedent, and it would be needless to review a decision precisely in accord with this Court's recent precedents.

The plaintiff's post-trial motions argued that the case produced a change in procedures, and that contention came to an end with the Trial Court's finding that "there was no credible evidence that any change in procedure or rule by Anderson Electrical was the proximate result of Walker having brought suit." (D-6).

The remaining argument was that while she went into the courtroom for money and came out with none, she had a verdict saying she had been harassed which was the equivalent of a declaratory judgment or injunction. The Eleventh Circuit analyzed this contention in light of this Court's precedents in *Texas State Teachers Association*, 489 U.S. 782 (1989), *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988) and held that it did not constitute a material alteration of the legal relationship of the parties. (A-10-14).

There could be no dispute with the Eleventh Circuit's application of the standard of "a material alteration of the legal relationship of the parties" since that is the "touchstone of the prevailing party inquiry" which this Court established in *Texas State Teachers Association*, 489 U.S. at 791-793. Similarly, there could be no dispute with the Court treating *Hewitt v. Helms*, 482 U.S. 755 (1987) and *Rhodes v. Stewart*, 488 U.S. 1 (1988), as "controlling."

Hewitt and *Rhodes* are indeed controlling. The plaintiff in *Hewitt*, having obtained a ruling that the complaint should not have been dismissed because he "suffered a denial of due process," was accorded prevailing party status by the court below. This Court reversed and held that "a judicial statement that does not affect the relationship between the plaintiff and the defendant is not an equivalent [of declaratory relief]," and that there must be a judicial resolution "which affects the behavior of the defendants toward the plaintiff." In terms which conclusively control the present case, the Court said that:

> As a consequence of the present lawsuit, Helms obtained nothing from the defendants. The only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. (482 U.S. at 761-762).

So also in *Rhodes*, the court below had awarded attorneys' fees based on a declaration that the defendants had failed to follow constitutional standards. Once again, this Court reversed, pointed out that the court below "misapprehended our holding in *Hewitt*," reiterated that a declaration "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant towards the plaintiff," and said that:

> In this case, there was no such result. . . . In the absence of relief, a party cannot meet the threshold requirement of §1988 that he prevail, and in consequence he is not entitled to an award of attorney's fees. (488 U.S. at 4).

The core of the case is that the Petitioner is attempting to obtain attorneys' fees by inventing the "formality of relief" idea. That is a non-existent issue. It has long been settled that "relief need not be judicially decreed in order to justify a fee award," as the Court said in *Hewitt*. (482 U.S. at 240). No such issue is involved in *Farrar*, nor is there any Circuit split on any such issue, nor was it in any respect involved in the decision below. The

Court of Appeals instead applied this Court's precedents in *Texas State Teachers Association*, *Hewitt*, and *Rhodes*. That and nothing more is all that the case concerns.

These precedents relied on by the court below have been reiterated by this Court in *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 483 (1990) (citing *Rhodes* for the holding that the plaintiff was not a prevailing party on appeal) and have been applied by the Courts of Appeals in a consistent line of cases denying attorneys' fees, including cases which this Court has declined to review. *National Coalition v. Thomas*, 828 F.2d 42 (D.C. Cir. 1987) (stating with reference to *Hewitt*, that "We believe that the Court's reasoning is fully applicable in this case."); *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991) ("In *Texas State Teachers Association* . . . the Court spoke of a 'resolution of the dispute which changes the legal relationship between the parties.'"); *Wilder v. Bernstein*, 944 F.2d 1028 (2nd Cir. 1991) (applying the "touchstone" of *Texas State Teachers Association*); *Crabtree v. Collins*, 900 F.2d 79 (6th Cir. 1990) (applying *Texas State Teachers Association*, *Hewitt*, and *Rhodes* in holding the plaintiff was not a prevailing party for attorneys' fees); *Swanson v. Elmhurst Chrysler Plymouth*, 882 F.2d 1235 (7th Cir. 1989), cert. denied, 493 U.S. 1036 (1990) (citing *Rhodes* for the holding that "since Swanson cannot recover any award under Title VII, Elmhurst must receive judgment even if there has been a violation of that statute."); *Robinson v. Arigoshi*, 933 F.2d 781 (9th Cir. 1991) ("The Supreme Court's decision in *Hewitt v. Helms*, 482 U.S. 755, 761-63, 107 S.Ct. 2672, 2676-77, 96 L.Ed.2d 654 (1987), instructs us to deny such a request."); *Dahlem v. Board of Education of Denver*, 901 F.2d 1508 (10th Cir. 1990) ("The Supreme Court has on several occasions discussed what is required to be a prevailing party," citing *Texas State Teachers Association*, *Hewitt*, and *Rhodes*.); *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988), cert. denied, 492 U.S. 905 (1989) (citing *Rhodes* and *Hewitt* for the holding that "Because plaintiffs received no relief on the merits of their claims as a result of this suit, they are

not prevailing parties within the meaning of 42 U.S.C. § 1988 and are not entitled to attorney's fees.").

In sum, consistent with both *stare decisis* and this Court's time and resources, there is every reason to decline further review of this decision which faithfully adhered to recent Supreme Court precedent. Finally, the Respondent, having successfully defended this lawsuit on the monetary battleground selected by the Petitioner, should not be subjected to any further pursuit of attorneys' fees following the zero dollar verdict.

IV.

RULE 14.5 SHOULD BE APPLIED TO A PETITION WITH ATTORNEYS' FEE AS THE ONLY OBJECT

The petition in this case falls far short of being an accurate rendition of the record. In a case concerning the rights of parties, such departures could arguably be excused.

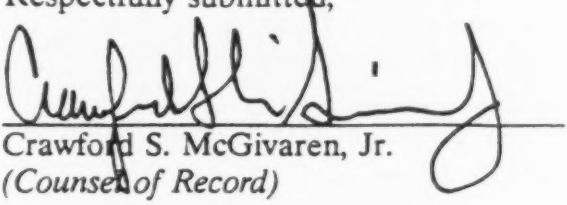
But in this case, which concerns only attorneys' fees and nothing else, still another reason for denial of the writ is the importance of adherence to accuracy. Compare Supreme Court Rule 14.5 ("The failure of a petitioner to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.").

CONCLUSION

There is nothing warranting further review of the attorneys' fee issue in this case. The Eleventh Circuit's opinion itself conclusively refutes the Petitioner's contention that the decision turned on formality of judicial relief. All that the Court required was that the plaintiff satisfy the "touchstone" of a material alteration of the legal relationship of the parties.

This holding was premised on and is entirely consistent with this Court's precedents in *Texas State Teachers Association*, *Hewitt*, and *Rhodes*. The petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this BRIEF IN OPPOSITION has been served by United States mail, first class postage prepaid, on:

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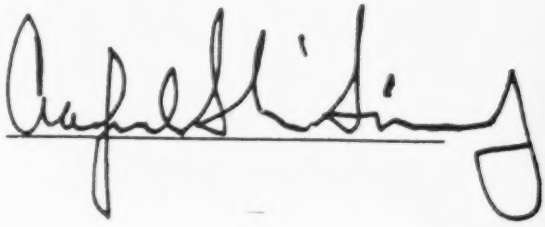
Counsel of Record for Petitioner.

This 10th day of June, 1992.



APPENDIX A

Court of Appeals Decision

October 18, 1991

944 F.2d 841

APPENDIX A

Ann WALKER, Plaintiff-Appellant,

v.

ANDERSON ELECTRICAL CONNECTORS, a Subsidiary of Square D Company, Defendant-Appellee.

No. 90-7636.

United States Court of Appeals,
Eleventh Circuit.

Oct. 18, 1991.

Appeal from the United States District Court for the Northern District of Alabama.

Before FAY and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

FAY, Circuit Judge:

Plaintiff-Appellant, Ann Walker ("Walker") appeals the outcome of several post-trial motions in which the district court ruled that Walker was not entitled to declaratory or injunctive relief, nominal damages, or attorneys fees, despite a jury finding of sexual harassment and invasion of privacy. For the reasons that follow, we AFFIRM.

I. BACKGROUND

In August 1989, Ann Walker sued both her employer, Anderson Electrical Connectors ("Anderson Electrical"), and her union, Local Lodge 2601, International Association of Machinists & Aerospace Workers, AFLCIO, under Title VII of the Civil Rights Act of 1964,[1] claiming that they "condoned and allowed [her] to be sexually harassed by management and personnel for a continuous period, making her working conditions intolerable." Walker also brought pendent state tort claims against Anderson Electrical for invasion of privacy and outrage.[2]

Initially, Walker's complaint contained a demand for jury trial only on the pendent tort claims. Following publication of an opinion in which the same district court judge permitted the use of a jury trial to resolve Title VII claims,[3] however, Walker successfully added her Title VII issues to the list of other issues to be heard by the jury. *Walker v. Anderson Elec. Connectors*, 736 F.Supp. 253 (N.D.Ala.1990).

In her complaint, Walker sought relief in the form of back-pay, benefits, lost seniority, loss pension, declaratory and injunctive relief, and attorneys' fees and costs for the alleged Title VII violation. Walker also sought actual and punitive damages for the pendent tort claims. At the pre-trial conference, however, Walker narrowed her grocery list of remedies by dropping her request for a declaratory judgment and an injunction. Walker's position statement, as drafted by Walker and incorporated into the pre-trial order by the court, reads as follows:

---

[1] 42 U.S.C. § 2000e *et seq.*

[2] The claim of outrage never reached the jury. It was dismissed on a motion for summary judgment.

[3] *Beesley v. The Hartford Fire Insurance Co.*, 717 F.Supp. 781 (N.D.Ala. 1989).

> As a result of these discriminatory actions of the defendants, the plaintiff seeks back-pay (including interest), benefits, lost seniority and loss pension. The plaintiff seeks compensatory and punitive damages according to proof against the defendants for invasion of privacy and tort of outrage. The attorney also seeks a reasonable attorney's fee, costs, and expenses of this litigation.

Following four days of trial, the jury returned its verdict through the use of special interrogatories. The jury found that Anderson Electrical had committed acts of sexual harassment against Walker in violation of Title VII and had invaded Walker's privacy. However, the jury also found that Walker had sustained no monetary damage, either in the form of compensatory or punitive damages, as a proximate result of these violations.[4/]

[4/] The interrogatories involving Anderson Electrical and the jury's responses to them are reprinted below.

> 1. Did defendant Anderson Electrical Connectors (Square D), commit any acts of sexual harassment against plaintiff, Ann Walker, in violation of Title VII of the Civil Rights Act of 1964 . . . ?
>
> YES X NO _
>
> 2. ONLY if the jury has answered "YES" to Question No. 1, did the said sexual harassment proximately cause plaintiff to lose any time from work?
>
> YES _ NO X
>
> 3. ONLY if the jury has answered "YES" to Question No. 1 and "YES" to Question No. 2, state the amount of wages, if any, which plaintiff has proven by a preponderance of the evidence that she lost a proximate result of defendant Anderson Electrical Connectors' said conduct violating the Civil Rights Act.

(continued...)

In response to the interrogatories involving Local Lodge 2601, the jury determined that the Union had committed no acts of sexual harassment against Walker.

Based on the answers to the special interrogatories, the district court entered final judgment ordering that the "[p]laintiff,

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[4/](...continued)

$\$$_____

7. Did defendant, Anderson Electrical Connectors (Square D), invade the privacy of the plaintiff, Ann Walker?

YES X NO __

8. ONLY if the jury has answered "YES" to Question No. 7, did the said invasion of plaintiff's privacy proximately cause plaintiff any injury?

YES __ NO X

9. ONLY if the jury has answered "YES" to Question No. 7 and "YES" to Question No. 8, state the amount of compensatory damAges, if any, which plaintiff has proven by a preponderance of the evidence that she sustained as a proximate result of said defendant's invasion of plaintiff's privacy . . .

$\$$_____

10. ONLY if the jury has answered "YES" to Question No. 8 and ONLY if the jury finds that plaintiff, Ann Walker, has proven by clear and convincing evidence that defendant Anderson Electrical Connectors consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff, state the amount of punitive damages to be assessed against defendant, Anderson Electrical Connectors, for the purpose of punishing it and deterring similar future acts of invasion of privacy.

$\$$_____

Ann Walker, shall have and recover nothing of defendants, or either of them." The court also refused to grant Walker attorneys' fees.

Walker filed several post-trial motions affecting only Anderson Electrical, all of which were denied. In addition to a motion for a new trial on the subject of damages, which is not at issue, all of the motions sought an injunction, a declaratory judgment, nominal damages, and attorneys' fees based on the jury finding of sexual harassment and invasion of privacy. 742 F.Supp. 591. The denial of these motions is the subject of this appeal.

II. DISCUSSION

A.

At the outset, Walker argues that the district court abused its discretion by denying her declaratory and injunctive relief in light of the jury's finding of a Title VII violation. We disagree.

Walker's post-trial motion for injunctive and declaratory relief was interpreted by the district court as a post-trial motion to amend the pre-trial order. The pre-trial order stated that Walker would seek only a money award. The district court indicated that Walker's failure to pursue declaratory and injunctive relief in the pre-trial order, where Walker had initially demanded such relief in her complaint, may have been part of a strategy to achieve a jury trial on the Title VII issues. "The absence of any prayer for equitable relief," the court noted in its Memorandum Opinion of July 9,1990, "subtracted somewhat from defendant's arguments against trial by jury."[5/]

[5/] According to Walker, the fact that declaratory and injunctive relief were not included in the pre-trial order was simple error. "There is nothing in the Record, and no finding by the district court, that the plaintiff knowingly and voluntarily waived [her] request for injunctive and

(continued...)

The court denied Walker's motion to amend the pre-trial order citing Fed.R.Civ.P. 16(e), which states that the pretrial order "shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pre-trial conference shall be modified only to prevent manifest injustice."

The district court's decision to follow the pre-trial order can be reversed on appeal only where the district court has abused its discretion. *Randolph County v. Alabama Power Co.*, 784 F.2d 1067, 1072 (11th Cir.1986), *cert. denied*, 479 U.S. 1032, 107 S.Ct. 878, 93 L.Ed.2d 833 (1987); *Hodges v. United States*, 597 F.2d 1014 (5th Cir.1979).[6/] "[W]e realize that for pretrial procedures to continue as viable mechanisms of court efficiency, appellate courts must exercise minimal interference with trial court discretion in matters such as the modification of its orders." *Hodges*, 597 F.2d at 1018.

While Rule 16(e) requires that the pre-trial order be modified to "prevent manifest injustice," in this case the modification requested by Walker would only serve to work an injustice against the defendant, Anderson Electrical. As the district court pointed out in its Memorandum Opinion of July 9, 1990, "Walker chose her strategy, forcing Anderson Electrical to choose its strategy. It would be disingenuous of any court to find at this late date that this pre-trial order can be modified post-trial in order to 'prevent manifest injustice.'"

[5/](...continued)
declaratory relief. The failure to mention such relief in the Pretrial Order was merely an oversight." Brief for Appellant at 11.

[6/] Decisions of the former Fifth Circuit handed down before October 1, 1981 are binding precedent in this circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

We agree with this reasoning and find that the district court did not abuse its discretion in following the pretrial order. Walker pursued a damages trial and got just that. It would be unfair to Anderson Electrical to give Walker relief which she did not request; relief for which Anderson Electrical was never permitted to establish a defense.

Walker's central argument on this matter is that the district court has not complied with Fed.R.Civ.P. 54(c). Rule 54(c) states, in pertinent part, that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Applying Rule 54(c) to the facts of her case, Walker contends that she is "entitled" to equitable relief based on the jury's finding of sexual harassment even though she abandoned this claim for relief in the pre-trial conference and actively pursued a monetary award. Walker further contends that Rule 54(c) and Rule 16(e) conflict under these facts and that Rule 54(c) prevails in the event of such a conflict.

We see no conflict and find that Rule 54(c) does not apply to this case. Rule 54(c) requires that the district court grant Walker only the relief to which she is "entitled," even when that relief is not requested in the pleadings. But Walker did request a declaratory judgment and an injunction in her pleadings and then abandoned this form of relief at the pre-trial conference in favor of something else, namely a money award. Rule 54(c) simply does not sanction this type of maneuvering. We hold that Walker is not entitled to the relief abandoned in the pre-trial order and affirm the district court's denial of her motion for injunctive and declaratory relief.

B.

Walker next argues that a jury finding of sexual harassment in violation of Title VII mandates a court award of one dollar in nominal damages and that the district court erred by not making such an award. We disagree.

The district court did not instruct the jury on the possibility of awarding nominal damages in the event of a finding of sexual harassment. Walker did not request a charge on nominal damages, nor did she object to the court's failure to make such a charge.[7/]

Fed.R.Civ.P. 51, which states that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection," precludes Walker, at this late date, from objecting to the fact that no jury instruction on nominal damages was given at trial. The federal court's long standing policy against additur, as an intrusion on the jury's domain and violation of the Seventh Amendment, also stands in the way of Walker's request for one dollar in nominal damages where the jury awarded none. *See Hattaway v. McMillian*, 903 F.2d 1440, 1451 (11th Cir.1990); *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935).

Walker argues that *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), requires the automatic award of nominal damages upon the finding of a Title VII violation regardless of Rule 51 and the federal courts' dislike of additur. *Carey* does not, however, address the issue of nominal damages in a Title VII action.

[7/] According to Anderson Electrical, the reason that Walker did not take a nominal damages instruction to the jury was because, "[i]f there had been an instruction or jury interrogatory on nominal damages, the jury might have given it, and that was a risk to be avoided by the plaintiff since she was after substantial money." (Brief for Appellee at 39-40).

Carey involved interpretation of 42 U.S.C. § 1983,[8/] which provides a remedy for violations of constitutional rights by persons acting under color of state law. Emphasizing the absolute nature of constitutional rights and "the importance to organized society that those rights be scrupulously observed," *Carey*, 435 U.S. at 266, 98 S.Ct. at 1053, the Court mandated the award of nominal damages upon the finding of a procedural due process violation even where no actual injury had been shown. By contrast, this case involves, not a violation of constitutional rights, but merely, a violation of purely statutory rights under Title VII. Nothing in *Carey* mandates the award of nominal damages for statutory violations.[9/]

[8/] Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[9/] Only, *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir.1990) *vacated*, ____ U.S. ____, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991), has extended *Carey* beyond the realm of 42 U.S.C. § 1983 by holding that nominal damages are mandatory upon the finding of racial discrimination in the making and enforcement of contracts in violation of 42 U.S.C. § 1981. However, the validity of *Hicks* is questionable. *Hicks* was vacated and remanded in light of the Eighth Circuit's en banc opinion in *Taggart v. Jefferson County Child Support Enforcement*, 935 F.2d 947 (8th Cir.1991). *Taggart* overruled *Hicks* on the issue of whether

(continued...)

Because we find that the reasoning in *Carey* applies only to violations of constitutional magnitude, we decline Walker's invitation to extend the rationale of *Carey* to Title VII cases and affirm the district court's denial of Walker's post-trial motion for nominal damages.

C.

Finally, we come to the crux of Walker's appeal-attorneys' fees. While an award of nominal damages, an injunction or a declaratory judgment would make the prospect of obtaining attorneys' fees much easier, Walker argues that even without these badges of victory she is a "prevailing party" under 42 U.S.C. § 2000e-5(k)[10/] and entitled to attorneys' fees.

42 U.S.C. § 2000e-55(k) provides, in relevant party, "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow *the prevailing party*, other than the Commis-

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[9/](...continued)
a claim for racially discriminatory termination under 42 U.S.C. § 1981 remain actionable after the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), thereby making the *Hicks* court's pronouncements on the issue of nominal damages moot.

[10/] Though the parties have cited 42 U.S.C. § 1988 as the controlling fee shifting provision in this case, 42 U.S.C. § 2000e-5(k) is the appropriate fee shifting provision in Title VII actions. This distinction is a technical one, however, as Congress intended the standards for awarding fees under these two statutes to be the same. *See* S.Rep. No. 1011, 94th Cong., 2d Sess. 3-4, *reprinted in* 1976 *U.S.Code Cong. & Admin.News* 5908, 5912. *See also Cofield v. City of Atlanta*, 648 F.2d 986, 987 n. 3 (5th Cir. Unit B 1981) ("The language of section 1988 tracks that of section 2000e-5(k).").

sion or the United States, a reasonable attorney's fee as part of the costs." (Emphasis added). In *Texas Teachers Association v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), the Supreme Court, in a unanimous opinion, found improper the Fifth and Eleventh Circuits' use of the "central issue" test to determine prevailing party status."[11/] In its place, the Court established the standard for identifying prevailing parties:

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Id. at 791-93, 109 S.Ct. at 1493-94 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)).

Walker claims that the jury verdict materially alters the legal relationship between the parties in the same fashion as an injunction or declaratory judgment. But Walker fails to successfully distinguish *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) and *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1(1988), two Supreme Court cases with similar fact patterns which reject similar arguments. We find these cases controlling.

In *Hewitt*, a plaintiff was denied attorneys' fees, despite a finding by the Third Circuit that his due process rights had been violated. *Hewitt*, 482 U.S. at 757-59, 107 S.Ct. at 2674-75. The

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11/ Under the central issue test, the plaintiff must achieve the primary relief sought in order to be deemed a "prevailing party." It is not enough to win on an important side issue. *See Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir.1985) (*en banc*).

plaintiff, a prisoner in the Pennsylvania state prison system, sued prison officials for placing him in disciplinary confinement without due process of law. The district court dismissed the case in a summary judgment motion. On appeal, the Third Circuit reversed, finding that there had, indeed, been a violation of due process. The case was remanded to the district court with instructions to award the plaintiff damages unless the defendants were able to assert an immunity defense. Finding such a defense, the district court again dismissed the case in a motion for summary judgment and in a later ruling denied the plaintiff attorneys' fees. With regard to the denial of attorney's fees, the Third Circuit reversed. Equating its initial finding of a due process violation with a declaratory judgment, the Third Circuit held that the plaintiff was a "prevailing party" under 42 U.S.C. § 1988 and entitled to an award of attorney's fees. The Supreme Court rejected the Third Circuit's rationale and reversed, holding:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces-the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion—is the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Hewitt, 482 U.S. at 761, 107 S.Ct. at 2676.

Walker argues that *Hewitt* is not controlling because, unlike the plaintiff in *Hewitt*, she has achieved much more than a hollow pronouncement on a matter of law. Walker points out that she won a favorable jury determination on the ultimate factual issue in the case and that this determination was an important part of "settling the score" with her employer. The jury finding of sexual harassment, she contends, has forever changed

the legal relationship between the parties by foreclosing the defendant's denial of such sexual harassment.

While we find this argument appealing, it simply does not conform to the basic premise of *Hewitt*. With regards to the plaintiff in *Hewitt*, the Court noted that, "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated." *Hewitt*, 482 U.S. at 762, 107 S.Ct. at 2676. Walker received nothing more. The jury's finding of sexual harassment no more altered the legal relationship between the parties than the Third Circuit's finding of a due process violation in *Hewitt*. And, just as the Third Circuit's finding was an important first step on the road to obtaining relief and "affect[ing] the behavior of the defendant towards the plaintiff," *id.* at 761, 107 S.Ct. at 2676, so too is the jury's finding of sexual harassment an important first step for Walker. But, as *Hewitt* suggests, such a finding, without more, will not ordain a litigant the prevailing party.

The Supreme Court's decision in *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988), reinforces our holding today. In *Rhodes*, two plaintiffs obtained a declaratory judgment for violations of their First Amendment rights as prisoners in a state corrections facility. Prior to the court's announcement of declaratory relief, however, one of the plaintiffs was released from prison and the other died. The Supreme Court held that the declaratory judgment could not, under those circumstances, affect the legal relationship between the parties. The plaintiffs' victory was moot despite the fact that they were awarded a declaratory judgment. As the Court noted, "[a] declaratory judgment . . . is no different from any other judgment. It will constitute relief . . . if, and only if, it affects the behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 4, 109 S.Ct. at 203.

While the jury's finding of sexual harassment in this case is not moot as it concerns Walker, Walker did not attain even a declaratory judgment as did the plaintiffs in *Rhodes*. Instead, Walker's only claim to the spoils of victory is a jury finding of

sexual harassment. "That is not the stuff of which legal victories are made." *Hewitt*, 482 U.S. at 760, 107 S.Ct. at 2675. Therefore, in accordance with *Hewitt* and *Rhodes*, we hold that to be a prevailing party for purposes of 42 U.S.C. § 2000e-5(k), requires the attainment of something more tangible than a jury finding of sexual harassment. The district court did not err in denying Walker's request for attorney's fees.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Walker's posttrial motions for declaratory and injunctive relief, nominal damages, and attorneys' fees.

APPENDIX B

Court of Appeals
Denial of Rehearing

January 9, 1992

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANN WALKER,

Plaintiff-Appellant,

versus

ANDERSON ELECTRICAL CONNECTORS,
a Subsidiary of Square D Company,

On Appeal from the
United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: FAY and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

APPENDIX C

District Court Opinion
and
Judgment

July 9, 1990

742 F.Supp. 591

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ANN WALKER,	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	89-AR-1482-M
ANDERSON ELECTRICAL	)	
CONNECTORS, ET AL.,	)	
	)	
Defendants	)	

FINAL JUDGMENT

Pursuant to the jury's answers to special interrogatories and in accordance with the memorandum opinion which accompanies this final judgment, it is ORDERED as follows:

1. Plaintiff, Ann Walker, shall have and recover nothing of defendants, or either of them. All relief, whether requested by plaintiff in the pretrial order or in plaintiff's motion filed on June 28, 1990, after the jury verdict, is DENIED.

2. As against defendant, Local 2601, International Associated Machinists & Aerospace Workers, the costs are taxed against plaintiff.

3. As against defendant, Anderson Electrical Connectors (Square D), the parties shall bear their own respective costs.

DONE this 9th day of July, 1990.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ANN WALKER,	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	89-AR-1482-M
ANDERSON ELECTRICAL	)	
CONNECTORS, ET AL.,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

Plaintiff, Ann Walker, was permitted, in response to the jury verdict of June 19, 1990, to suggest to the court by special motion what judgment should be entered on that verdict. The pretrial posture of the case is set out in *Walker v. Anderson Electrical Connectors*, 736 F. Supp. 253 (N.D. Ala. 19901), and need not be repeated.

At this juncture, defendant-employer, Anderson Electrical Connectors, is understandably no longer complaining about the jury trial of a Title VII case (at least not in *this* case). This court, nevertheless, cannot resist a short addendum to its series of opinions holding that the parties to a Title VII case are entitled, upon demand, to trial by jury on the money issues, including the "back pay" issue, which many courts have described as a form of equitable relief thereby avoiding the Seventh Amendment issue. On April 10, 1990, a district court in Montana held: "Congress, in enacting the ADEA, did not abrogate the states' eleventh amendment immunity from suit in federal court and, consequently, the eleventh amendment precludes an award of back pay against a state thereunder." *Black v. Goodman*, 736 F. Supp.

1042, ___ (D. Mont. 1990). It is, of course, a well understood principle that the Eleventh Amendment provides states immunity from claims for legal relief but not from appropriate *equitable* relief. By finding the State of Montana immune from a claim for "back pay," the court was necessarily finding that "back pay" constitutes a legal remedy. It would be an impermissible anomaly for "back pay" to be a legal remedy under the ADEA but an equitable remedy under Title VII. If "back pay" is a legal remedy, the Seventh Amendment clearly controls who shall make the factual determinations.

After this case was submitted to the jury which Walker had demanded over defendants' strenuous objection, the jury answered special interrogatories as follows:

> 1. Did defendant, Anderson Electrical Connectors (Square D), commit any act or acts of sexual harassment against plaintiff, Ann Walker, in violation of Title VII of the Civil Rights Act of 1964 at any time less than 180 days before plaintiff filed her complaint with the Equal Employment Opportunity Commission on February 28, 1989?
>
> YES _X_ NO _____
>
> 2. ONLY if the jury has answered "YES" to Question No. I, did the said sexual harassment proximately cause plaintiff to lose any time from work?
>
> YES _____ NO _X_
>
> 3. ONLY if the jury has answered "YES" to Question No. 1 and "YES" to Question No. 2, state the amount of wages, if any, which plaintiff has proven by a preponderance of the evidence that she lost as a proximate result of defendant Anderson Electric Connectors' said conduct violating the Civil Rights Act.
>
> $ _____

4. Did defendant, Local 2601, International Association of Machinists & Aerospace Workers, commit any act or acts of sexual harassment against plaintiff, Ann Walker, in violation of Title VII of the Civil Rights Act of 1964 at any time less than 180 days before plaintiff filed her complaint with the Equal Employment Opportunity Commission on February 28, 1989?

YES _____ NO __X__

5. ONLY if the jury has answered "YES" to Question No. 4, did the said sexual harassment proximately cause plaintiff to lose any time from work?

YES _____ NO _____

6. ONLY if the jury has answered "YES" to Question No. 4 and "YES" to Question No. 5, state the amount of wages, if any, which plaintiff has proven by a preponderance of the evidence that she lost as a proximate result of defendant, Local 2601, International Association of Machinists & Aerospace Workers', said conduct violating the Civil Rights Act.

$ _____

7. Did defendant, Anderson Electric Connectors (Square D), invade the privacy of plaintiff, Ann Walker?

YES __X__ NO _____

8. ONLY if the jury has answered "YES" to Question No. 7, did the said invasion of plaintiff's privacy proximately cause plaintiff any injury?

YES _____ NO __X__

9. ONLY if the jury has answered "YES" to Question No. 7 and "YES" to Question No. 8, state the amount of compensatory damages, if any, which plaintiff has proven by a preponderance of the evidence that she sustained as a proximate result of said defendant's invasion of plaintiff's privacy (giving said defendant credit for any lost wages which may have been awarded by the jury in answer to Question No. 3, that is, if the jury finds the said lost wages to have been proximately caused both by invasion of privacy and by sexual harassment).

$ _____

10. ONLY if the jury has answered "YES" to Question No. 8 and ONLY if the jury finds that plaintiff, Ann Walker, has proven by clear and convincing evidence that defendant Anderson Electrical Connectors consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff, state the amount of punitive damages to be assessed against defendant, Anderson Electrical Connectors, for the purpose of punishing it and deterring similar future acts of invasions of privacy.

$ _____

Neither Walker's complaint nor her statement-of-position in the pretrial order indicated any intention by her to seek any form of relief except monetary damages and attorney's fees. There was no request for reinstatement or for any kind of declaratory, injunctive or other equitable relief. This fact(made it easier than it otherwise would have been for this court to grant plaintiff's demand for a jury trial. Certainly, the absence of any prayer for equitable relief subtracted somewhat from defendants' arguments against trial by jury.

The court did not give any instruction to the jury on "nominal damages." There was no such charge requested by Walker and no exception taken to the court's failure to charge on "nominal damages" as an alternative form of compensation.

In her post-verdict motion, Walker asks this court to award her nominal damages, to grant her declaratory and injunctive relief, including a declaration that she is the prevailing party, and to grant her attorney's fees under 42 U.S.C. § 1988.

Under any view of the jury responses, it is obvious that Walker did not prevail against the union defendant, Local 2601, International Association of Machinists & Aerospace Workers. Therefore, Local 2601 is, without question, entitled to a final judgment in its favor.

As to defendant-employer, Anderson Electrical, the jury found that it had committed one or more acts of sexual harassment against Walker in violation of Title VII of the Civil Rights Act of 1964, but the jury also found that Walker suffered no lost time from work, and thus no monetary loss as a proximate result of the said harassment. With respect to Walker's pendent state claim for invasion of privacy, the jury similarly found that Anderson Electrical's invasion of Walker's privacy caused Walker no injury.

It is tempting to speculate about the jury's rationale. From the evidence, it theoretically could be that the jury found only one act of sexual harassment by the former Anderson Electrical supervisor, who, incidentally, was a prominent witness for Walker. This could logically explain the finding of harassment without injury. It is also theoretically possible that the jury found that Walker provoked undue male familiarity and thus proximately caused her own injury, if any. It alternatively could be that the jury found that Walker's psychological condition and resulting hospitalization was feigned, or was the product of drug abuse, or was the product of childhood psychological trauma and was not the proximate consequence of any harassment in the work place. These are, of course, mere speculations, which, though perhaps justified by the evidence, cannot be used as an excuse for

substituting the court's judgment for that of the jury. The entire purpose of the Seventh Amendment, a purpose which this court subscribes to as much as the framers subscribed to it, if applied in Title VII cases as this court has done, and believes must be done, would be lost if the court allowed itself to second-guess the jury. This court does not know, and will not state, what it would have done had this been a bench trial and had it been called upon to evaluate the various witnesses for their credibility. With the jury sitting in the box as mandated by the Seventh Amendment, this court deliberately left the weighing of the evidence to the jurors.

Walker argues that this court's discretionary powers under Title VII include the right to develop appropriate relief beyond what the jury gave. Walker argues that the court is *required* under these precise circumstances to award at least nominal damages in recognition of Walker's success on the liability question. Walker's argument is flawed in several respects, and all of the flaws are occasioned by two facts: (1) that this was a jury trial, and (2) that Walker never requested nominal damages as an alternative form of relief. By failing to take exception to the jury charge which did not mention nominal damages, Walker gave up that option. Also, insofar as Walker's request for nominal damages is concerned, even nominal damages, if they are to be awarded, must be the *proximate consequence* of the wrongful act complained of, and the jury in this case rejected any such causal connection. It was undisputed that Walker has been off work and lost wages. This necessarily means that the jury found against her on the issue of proximate cause. Furthermore, Walker cites no authority for the right of a court to award nominal damages after a jury has found no damage whatsoever. A helpful and very recent indication that Walker's would-be proposition is erroneous is contained in *Hattaway v. McMillian*, ___ F.2d ___ (11th Cir. 1990), decided on June 25, 1990. There the Eleventh Circuit said:

> [W]e note that a long line of consistent decisions of the United States Supreme Court forbid the plaintiff from accepting a remittur--even under protest--

> and then appealing the order granting the remittur. *See Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50, 97 S.Ct. 835, 836-37, 51 L.Ed.2d 112 (19771 (per curiam) (noting cases). This principle applies as a matter of federal procedure in "either a state or federal cause of action." Id. at 650, 97 S.Ct. at 837. Finally, we note that there are no federal cases applying these principles to an additur order. Of course, the paucity of federal precedent is not surprising given the fact that *the order of an additur by a federal court violates the seventh amendment right to a jury trial in civil cases. Dimick v. Schiedt*, 293 U.S. 474, 486-88, 55 S.Ct. 296, 79 L.Ed. 603 (1935); *Hawkes v. Ayers*, 537 F.2d 836, 837 (5th Cir. 1976).

Slip opinion. p. 3290 (footnote omitted) (emphasis supplied). The *Hattaway* court agrees with this court that a jury's verdict precludes the possibility of adding any money to the verdict, whether a million dollars or a dollar.

Rule 16(e), F.R.Civ.P., forever locked the door against Walker as to relief beyond the relief she claimed in the pretrial order. Walker chose her strategy, forcing Anderson Electric to choose its strategy. It would be disingenuous of any court to find at this late date that this pretrial order can be modified post-trial in order to "prevent manifest injustice." See Rule 16(e). It would be manifestly *unjust* for the court to grant relief which Walker did not seek and which the jury did not give.

Walker, even now, conspicuously does not ask for the equitable remedies of restitution or so-called "front pay." If this is not because she did not ask for any such relief in the pre-trial order, it is because Anderson Electrical is prepared to take her back as soon as she is released by her doctor for work. She never claimed that she was constructively discharged.

Assuming *arguendo* that this court could assume the power to enjoin Anderson Electrical not to commit future acts of sexual harassment against females, this court would decline to do so,

believing: (1) that in an individual's case (as contrasted with a class action), any injunctive relief should be limited to the individual plaintiff; (2) that Anderson Electrical has already rid itself of the highest profile sexual harasser, Walker's own witness; (3) that Anderson Electrical's written policy against sexual harassment contains basically the same provisions which an injunction would contain; (4) that Title VII itself, bolstered by the jury finding in this case, provides an adequate warning to Anderson Electrical and a sufficient guarantee against future sexual harassment; and (5) that the future monitoring of an injunction in a non-class-action case would be impossible at worst and unduly burdensome at best.

This court is hesitant to mention an issue not raised by either party. The court mentions it, nevertheless, for what effect it may have. During the trial, it became apparent for the first time, at least to the court, that Walker was adjudicated bankrupt under Chapter 7 after any claim or cause of action presented by Walker in this case had accrued. Her claims against Anderson Electrical and Local 2601 were not listed on her bankruptcy schedules. They should have been so listed, because all of her claims for money or property became the property of her bankruptcy estate. After bankruptcy, she personally would have had no standing to pursue these particular claims, or any other claim accruing pre-bankruptcy. *See Harris v. St. Louis University*, 53 F.E.P.C. 643, 58 U.S.L.W. 2634 (E.D. Mo. 1990), and cases cited therein. In the instant case, the fact that Walker has been discharged in bankruptcy and that her trustee-in-bankruptcy, on behalf of her creditors, abandoned all unmarshalled assets, may repair the jurisdictional damage. If Walker's trustee or a sophisticated creditor had known of her great expectations from this case, as testified to by some of the witnesses, they would have been ecstatic. As of now, any complaint by Walker's trustee or by a creditor would be quixotic.

Lastly, the court notes that Walker does not ask for a new trial. By noting this fact, the court does not mean to suggest that a new trial would be granted if Walker should now invoke Rule 59, F.R.Civ.P.

A separate final judgment will be entered.

DONE this 9th day of July, 1990.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

District Court Opinion
August 6, 1990

and

Addendum
August 10, 1990

742 F.Supp. 596

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ANN WALKER,	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	89-AR-1482-M
ANDERSON ELECTRICAL CONNECTORS, ET AL.,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

Plaintiff, Ann Walker, has moved for reconsideration and alteration of the final judgment entered against her on July 9, 1990. She has alternatively moved for a new trial limited to the question of the amount of damages to be assessed against defendant, Anderson Electrical Connectors. Neither motion attacks the judgment entered on the verdict rendered in favor of the other defendant, Local 2601, International Association of Machinists and Aerospace Workers.

Walker repeats her earlier post-verdict insistence that she be awarded nominal damages by the court. She also argues that her action achieved significant changes in her employer's policies regarding the work environment, justifying her being deemed the prevailing party for purposes of 42 U.S.C. § 1988. After rethinking these questions, the court finds no reason to alter the conclusions it reached on July 9, 1990.

I. Nominal Damages Are Not Available to Vindicate a Jury-Tried Claim for Sexual Harassment.

For the imposition of nominal damages, plaintiff relies upon *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978), which stands for the proposition that the violation of certain absolute rights may entitle a plaintiff to nominal damages even without proof of actual damage. In *Carey*, the Supreme Court found that "procedural due process" was such an absolute right. The first noticeable difference between *Carey* and Walker's case is that "due process" and "sexual harassment" are like apples and oranges. It is hard to argue that freedom from sexual harassment is an ***absolute*** constitutional right. Another very significant difference between *Carey* and Walker's case is that Walker was tried to a *jury* empaneled on plaintiff's demand. That jury expressly found that defendant's conduct did not proximately cause plaintiff any damage. In other words, Walker attempted to prove actual damage as a proximate result of sexual harassment and failed. In *Carey* no evidence of damage was even offered by the plaintiff, who instead chose to rely upon the pure principle of vindication for which nominal damages might be awarded. In *Carey*, the Supreme Court quoted the trial court as follows:

> "Plaintiffs put no evidence in the record to qualify their damages, and the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries. Plaintiffs' claims for damages therefore fail for complete lack of proof."

98 S.Ct. at 1046.

The failure of the plaintiff in Carey to prove actual damages was thus a deliberate choice, whereas Walker opted for nominal damages only after having tried and failed to prove actual damages to the jury. Lastly, the Supreme Court was careful in *Carey* to recognize that the award of nominal damages for a denial of "due process" without any proof of actual damage was a narrow exception to the usual rule. The Court recognized such

an exception only where there was no "common law analogue." In Walker's case, Walker herself sought a state remedy, or "analogue," when she claimed an invasion of her privacy, an Alabama tort.[1/] If this court cannot award Walker nominal damages for an of invasion of privacy, Walker apparently concedes, the court cannot award Walker nominal damages for a Title VII violation if the lesson of *Carey* is applied.

II. New Trial on Issue of Damages Alone Is Prohibited by Seventh Amendment.

When a jury has fixed the amount of damages, whether at zero or at a million dollars, the same Seventh Amendment upon which Walker relied for her jury demand precludes the court from imposing an additur. In *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296 (1935), the Supreme Court said:

> The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess--in that sense that it has been found by the

---

1/ The jury, consistent with its response to Walker's Title VII claim, found Anderson Electrical technically guilty but also found that Walker had not sustained any damage as a proximate consequence.

jury--and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept "an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."

It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. Funk v. United States, 290 U.S. 371. But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, common law, but to alter the Constitution. The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations, 8th ed., 124.

It is worthy of note that while for more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages, no

> federal court, so far as we can discover, has ever undertaken similarly to *increase* the damages, although there are numerous cases where motions for new trial have been made and granted on the ground that the verdict was inadequate.

293 U.S. at pp. 486-487 (emphasis supplied).

While *Dimick* proves that this court was correct in granting plaintiff a jury trial, its help to plaintiff comes to an end at that point. Why? Because Walker does not ask for a complete new trial. She only asks alternatively for a new trial *on the issue of damages.* Even if she had asked for a new trial on all issues, the court would be unable to find that the damage award of zero was so inadequate as to call for a complete new trial, because this jury found that there was *no injury whatsoever traceable to any wrong committed by Anderson Electrical.* The jury quite clearly found against Walker on the issue of proximate causation. This is dissimilar to a hypothetical case in which a jury finds misconduct by a defendant proximately causing plaintiff indisputably serious injury, including $10,000.00 in medical expenses, but renders a $100.00 verdict. If such were the case here, a complete new trial might be in order, but *additur* would not be proper because, as Dimick says, *additur* would violate the Seventh Amendment.

Although not cited by Walker, this court has found and has considered *Hicks v. Brown Group,* Inc., 902 F.2d 630 (8th Cir. 1990). Even if the Eighth Circuit is correct in *Hicks,* its opinion there is easily distinguishable. There, the district court added $1.00 in nominal damages only after a jury had awarded $10,000.00 in punitive damages without awarding any actual damages. The jury had been instructed on punitive damages but, for aught appearing, had not been instructed on the necessity of awarding at least nominal damages as a prerequisite to punitive damages. In Walker's case, there was no possibility of punitive damages being awarded against Anderson Electrical under her Title VII claim. More importantly, this court seriously doubts the correctness of *Hicks,* in which there was a strong dissent. The

Eighth Circuit seems to want to overrule the Supreme Court's *Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363 (1989). This court agrees with the dissent in *Hicks* that *Patterson* precluded that particular action brought under 42 U.S.C. § 1981. If this court and the dissenter in *Hicks* are correct, the pronouncements by the Eighth Circuit on an *additur* of nominal damages becomes moot. Other courts promptly declined to follow *Hicks*. *See Kozam v. Emerson Elec. Co.*, ____ F. Supp. ____, 1990 WL 75655 (N.D. Miss. 1990); *McKnight v. Gen. Motors Corp.*, ___ F.2d ___, 1990 WL 89739 (7th Cir. 1990).

III. Walker is Not a Prevailing Party Under 42 U.S.C. § 1988.

Walker is asking this court to reach conclusions beyond the issues presented and not justified by the evidence. Walker sought no injunctive relief, and there was no credible evidence that any change in procedure or rule by Anderson Electrical was the proximate result of Walker having brought suit." The issue of entitlement under 42 U.S.C. § 1988 has been fully addressed in the opinion of July 9, 1990.

CONCLUSION

For the reasons stated above, as well as for the reasons expressed in the memorandum opinion of July 9, 1990, plaintiff's post-judgment motions will be denied.

DONE this 6th day of August, 1990.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ANN WALKER,	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	89-AR-1482-M
ANDERSON ELECTRICAL	)	
CONNECTORS, ET AL.,	)	
	)	
Defendants	)	

ADDENDUM TO MEMORANDUM OPINION

After the memorandum opinion of August 6, 1990, was entered, it was brought to the court's attention that in refusing to award nominal damages, the court never mentioned the fact that the only relief ever sought by Ann Walker was lost wages. Special interrogatory No. 2 addressed to the jury asked "did the said sexual harassment [found in response to interrogatory No. 1] proximately cause plaintiff to lose any time from work?" Walker did not object to the form of this question. Her failure to object is understandable, because her evidence was designed to persuade the jury that her absence from the work place was occasioned by the sexual harassment which had caused her to have to undergo treatment for depression. The jury answered "No."

There was a super-abundance of evidence upon which the jury could find, as it did, the Walker's departure on sick leave was unrelated to an sexual harassment which may have occurred in the work place. If the court should now give Walker a dollar, the dollar would logically have to represent "lost wages." Such an additur would contradict the express jury finding that Walker lost no wages as a consequence of any employer misconduct. Such an

additur would be an obvious and egregious invasion of the province of the jury, something which this court, believing as it does in the Seventh Amendment, cannot do.

DONE this 10th day of August, 1990.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

District Court Order

August 16, 1990

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ANN WALKER,	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	89-AR-1482-M
ANDERSON ELECTRICAL	)	
CONNECTORS, ET AL.,	)	
	)	
Defendants	)	

ORDER

Plaintiff, Ann Walker, has filed a motion for attorney's fees and expenses pursuant to Local Rule 11. For the reasons stated in the memorandum opinions of July 9, 1990, August 6, 1990, and August 10, 1990, and for the further reason that the motion is not accompanied with any proof, the motion is DENIED.

DONE this 16th day of August, 1990.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE